

Goebert Mechanical Corporation and Thomas Brown. Case 3-CA-15641

March 22, 1991

DECISION AND ORDER

BY MEMEBERS CRACRAFT, DEVANEY, AND
OVIATT

On November 5, 1990, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent filed exceptions and a supporting brief,¹ and the General Counsel filed a brief in reply to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,² and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Goebert Mechanical Corporation, Batavia, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹ Member Oviatt would have denied the Respondent's late-filed request for an extension of time in which to file its exceptions and brief.

² The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Ron Scott Esq., for the General Counsel.

Gary Horton, Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was tried in Batavia, New York, on August 28, 1990. The complaint was issued on June 21, 1990, and alleged in substance that the Respondent violated Section 8(a)(1) of the Act by terminating on May 4, 1990, the employment of Thomas Brown, James Carter, and Dennis Long because of their protected concerted activities.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, which is engaged as a plumbing, heating, and ventilation contractor, admits and I find that it is an em-

ployer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. FINDINGS AND CONCLUSIONS

Dennis Long was employed by the Respondent since October 1988. Thomas Brown was employed since December 1989. James Carter, who for a period of time worked as a subcontractor to Goebert, was hired as a full-time employee in January 1989.

Among the employees' benefits, the Respondent paid for a medical insurance plan through Blue Cross. However, in April 1990 Carter received medical bills that were supposed to be covered by the Blue Cross Plan and it soon became evident that the Employer had not made payments for some time. As a consequence, the employees were notified by Blue Cross that they no longer were covered by medical insurance.

On various occasions in April 1990 Carter, Long, and Brown individually and collectively, confronted Goebert about their lack of medical coverage. In each instance, Goebert attempted to assuage them by stating either that there was some computer error or that the money would be paid shortly.

On April 20, the three employees spoke to Goebert at his office and were told that the bill had been paid. Nevertheless, when Brown called the insurance company on April 21, 1990, he was told that this was not true.

According to Dennis Long, about a week before May 4, while working at North Point, he overheard Goebert indicate to the foreman of another contractor that he had hired another mechanic and was about to layoff his present work force.

On May 3, 1990, the three employees decided to talk to Goebert the following day before work in an attempt to resolve the insurance issue.

On May 4, 1990, Brown, Carter, and Long met with Goebert in the office around 8 a.m. When asked when the insurance premiums would be paid, Goebert replied that he had sent in the money. Being skeptical of this answer (based on past experience), the employees demanded some sort of proof that the money had been remitted and indicated that they would not commence work until such proof was demonstrated. When the parties were at a standstill on this matter, Goebert finally told the employees that he would have to let them go. Thereupon, each employee was given a layoff slip and they left.

Clearly medical insurance is part of an employee's wages and conditions of employment. Accordingly, a concerted protest regarding the Employer's failure to make the payments required to provide such coverage constituted protected concerted activity within the meaning of Section 7 of the Act. Moreover, even assuming that the employees threatened to strike in an effort to obtain the medical insurance coverage that was part of their promised remuneration, such an action would be protected under the Act and their discharge or layoff on such an account would violate Section 8(a)(1) of the Act. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962); *NLRB v. City Disposal Systems*, 465 U.S. 115 (1984). *Vic Tanny International v. NLRB*, 622 F.2d 237 (6th Cir. 1980).

In the present case the sequence and timing of the events tends to establish that Brown, Carter, and Long were discharged on May 4, 1990, because of their concerted protest

regarding the Respondent's failure to maintain their medical coverage. Indeed, the evidence makes out a very strong prima facie case that their discharges were illegally motivated. As such, the burden of proving that these employees would have been terminated for reasons other than their protected concerted activity shifts to the Respondent. *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982).

In my opinion, the Respondent has not met its burden of proof. Goebert asserts that the employees were performing satisfactorily up until about December 1989 when their productivity dropped off. In this respect, he claim that he received reports that when these people were left on their own at a jobsite, they did not put in a full day's work unless he was there to personally supervise them. Yet, although it was shown that Goebert, on occasion, reminded the employees to work faster, he never issued any warnings or other discipline to them¹ or indicated that their continued employment might be in jeopardy. Moreover, he waited almost 4 months before replacing them. Further, there was a significant discrepancy between the testimony of the Respondent's witnesses regarding the decision to discharge the three employees. Thus, although Goebert and his new foreman, Joseph Pionessa, testified that they had decided to discharge all three employees prior to May 4, Pionessa at one point in his testimony contradicted this assertion when he stated that he had decided to retain Dennis Long.

It may be that the Respondent began to contemplate discharging the three employees before May 4, 1990. However, I am convinced that the decision was not motivated by their alleged poor productivity. Rather, I am persuaded that the decision to discharge them was motivated by their justified complaints regarding the failure of the Company to maintain their medical insurance coverage. I am convinced that it was the concerted protest by the employees on May 4, 1990, which was the proximate cause of the Employer's decision to discharge them on that date.

CONCLUSION OF LAW

By discharging Thomas Brown, Dennis Long, and James Carter because of their protected concerted activity, the Respondent has violated Section 8(a)(1) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper

offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²

ORDER

The Respondent, Goebert Mechanical Corporation, Batavia, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging its employees for engaging in concerted activities for the purposes of their mutual aid or protection.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Thomas Brown, Dennis Long, and James Carter immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or and other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of this decision.

(b) Remove from its files any reference to the unlawful discharge of aforesaid employees and notify them in writing that this has been done and that the discharges will not be used against them in anyway.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Batavia, New York, copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

²If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

³If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

¹Goebert testified that he gave verbal warnings to the employees. On the other hand, the employees credibly testified that at most, he gave them pep talks designed to increase productivity and never issued anything that resembled a verbal warning.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge our employees for engaging in concerted activities for the purposes of their mutual aid or protection.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Thomas Brown, Dennis Long, and James Carter immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL notify Thomas Brown, Dennis Long, and James Carter that we have removed from our files any reference to their discharges and that the discharges will not be used against them in any way.

GOEBERT MECHANICAL CORPORATION